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ACCOUNTS SETTLED.

Where a bill is filed to impeach a settled account on the ground of error in the account, the errors alleged must be positively and specifically stated. *Mebane* v *Mebane*, 403

ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

APPEAL.

See SURETY.

ASSIGNMENT.

1. In equity, a distinct appropriation and delivery over by a debtor of his *choses in action*, for the benefit of one of his creditors, is an assignment of them, and will prevail against a subsequent assignment by deed of all his *choses in action* to another creditor; for, as in neither case is the assignment a transfer of the legal interest in the *choses in action*, that which is in equity an assignment first in point of time, will prevail. *Thigpen* v *Horne*, 20

2. An assignment by deed of all a debtor's *choses in action*, for the benefit of one of his creditors, will not entitle that creditor to claim money, not the proceeds of such *choses in action*, paid subsequently by the debtor to another creditor. *Ibid*

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AWARD.

Where an action was brought at law against the sureties to a guardian bond, given to secure the estate of four wards, in which the breach assigned was, that the guardian had wasted the estate, and failed to account for, and pay over to the wards, their property; and the defendants confessed what they called a partial judgment, when it was agreed by the parties that the plaintiffs' additional claim should be referred to arbitrators, and their award be made a rule of court, *it was held*, that a paper, returned by the arbitrators, in which they made no

award upon the matters referred to them, but only a statement, from which it appeared that they attempted to take the separate accounts between the guardian and his four wards *ab initio*, taking no notice of the partial judgment, and awarding no sum definitively against the defendants, was a calculation made to aid the court in its ulterior proceedings, rather than a definite award; and that a bill could not be sustained in equity to give the plaintiffs the benefit of it as an award. *Cheek* v *Davidson*, 68

BASTARDS.
See ILLEGITIMATE CHILDREN.

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See JURISDICTION, 8, 9, 10, 11, 19.

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CONTRACT.

1. The plaintiff, by an absolute deed of bargain and sale, conveyed a tract of land to the defendant. At the time of the execution of the deed, the defendant agreed that the plaintiff might have the land back, provided he repaid the purchase money and interest within two years, or, if he could, within that time, sell it to one who would give a higher price. Both parties spoke of it as a sale, and the price given was the full value of the land. *Held* that this agreement amounted only to a contract for the re-sale of the land within two years, and did not constitute a mortgage. *King* v *Kincey*, 187
2. Instruments, deliberately executed, professing to contain the agreement of parties, may be rectified in equity for fraud or mistake, but it must be upon clear proof. *Harrison* v *Howard*, 407

See FRAUD—HUSBAND AND WIFE, 6, 7.

CONVERSION.

1. A testator by his will devised, among other things, as follows: "I leave all my lands not given away, to be sold at six and twelve months credit; after my debts are paid, the residue of my estate to be divided between my wife, daughter, and son," and he appointed an executor "to sell his lands before-mentioned," and to execute his will in all respects, *it was held* that the testator intended a sale of his real estate at all events, either to create a fund for the payment of debts, in room of a part of the personal estate, or for a division between the wife, daughter, and son; and that therefore, in this Court, the fund is considered as converted, *out and out*, into personality. *Proctor* v *Ferebee*, 143
2. *Held further*, that where, in this case, the executor had re-

fused to qualify, and an administrator with the will annexed had sold the lands, and a Court of Law had decided that he had no power to convey a legal title, yet as the administrator had disposed of the proceeds of the sale according to the directions of the will, the heirs at law of the testator were but trustees for the purchaser, and should be decreed to convey to him the legal title. *Ibid.*

3. When land is directed by a testator to be converted *out and out* into personalty; the share of the wife belongs, in the view of a Court of Equity, to her husband, as other personalty. *Ibid.*

CORPORATIONS.

1. When a corporation is dissolved, unless the Legislature has otherwise directed, the real property, which had belonged to it and remains undisposed of, reverts to the donor or grantor—the personal property, as having no owner, goes to the sovereign for the benefit of the public—but *choses in action* such as debts, &c. become extinct, because there is then no one to demand the money, &c. *Fox* v *Horah*, 358
2. None of the provisions of the act of 1831, Rev. St. c. 26, directing what proceedings may be had against corporations in certain cases, apply to cases, where the corporation has expired by the limitation of its charter. *Ibid.*
3. Where a note was made payable to the Cashier of the State Bank, as trustee for the use and benefit of the bank by whom it was discounted, and the bank charter afterwards expired, by its own limitation, before the note could be collected; *it was held* that, although the cashier, having the legal title, might sue on the note and recover judgment at law; yet, in equity the bank had the sole right to the money secured by the note, that this right became extinct on the dissolution of the corporation, and that a Court of Equity, therefore, on application of the maker of the note, would grant a perpetual injunction against the collection of the judgment. *Ibid.*

COSTS.

1. Where the allegations in the plaintiff's bill, denied by the defendants, are not so supported by the proofs that the court can decree in favor of the plaintiff, yet if the defendants appear not to have been full and candid in their answers, but to have suppressed some facts which they feared might operate in the plaintiff's favor, the bill will be dismissed without costs. *Griffin* v *Pleasant*, 152
2. A party, who seeks an account and whose bill is dismissed on its merits, ought to bear the expense of an unnecessary and harrassing re-examination of accounts. *Shutt* v *Carloss*, 232
3. Where a bill makes unfounded charges of fraud, but the plaintiffs were infants, when the matters, which the bill seeks to investigate, occurred, & they had an apparent cause for de-

manding an investigation, and may have been misled into the imputations by false rumors —although the bill is dismissed, it will be without costs. *Wade* v *Dick*, 313

4. Where a bill of injunction has been filed against two executors, and there is no necessity for the severing in their answers, separate costs should not be allowed to each. *Davis* v *McNeil*, 344

5. If such has been the judgment of the court below, upon the dissolution of the injunction, and the case, being continued as an original bill, afterwards comes up to this court, and the bill be dismissed, no attorney's fee will be allowed to be taxed for the defendant. *Ibid*

6. Where upon a bill to set aside a deed obtained by a son from an aged mother, on the ground of fraud, imposition and incapacity of the grantor, the court decided there was not proof to support the allegations, & therefore they dismissed the bill, yet they dismissed it without costs, because suspicions were excited by some part of the testimony as to the fairness of the defendant's conduct in procuring the deed. *Harkey* v *Harkey*, 394

See GUARDIAN AND WARD, 20. JURISDICTION, 1.

DECREE.

See JURISDICTION, 12.

DEED.

1. Where a barginor executes a deed, absolute on its face, and asks a Court of Equity to declare it a mortgage, he must show that the real intent of the parties was, that it should only be a *security*, and that it put on the form of an absolute deed by reason of the ignorance of the draftsman, or from mistake of the parties, or because of undue advantage taken of the necessities of the debtor. *McDonald* v *McLeod*, 221

2. Solemn instruments between parties, able to contract, must, in the presumption of every court, declare the truth in regard to the subject matter of their contract, until error, mistake or imposition be shown. *Ibid*

3. Where the instrument given was an absolute bill of sale for a slave—where the sum paid was not grossly disproportionate to the value of the slave —where it did not appear that the agreement, on the part of the defendant, that the plaintiffs might have the slave on repayment of the purchase money, was made before or at the time of the execution of the bill of sale—where the defendant had refused to take a mortgage, and seven years had elapsed without any claim on the part of the plaintiffs, the court would not consider the bill of sale as a mortgage, and dismissed the plaintiffs' bill calling for such a decree. *Ibid*

4. A deed, whether for valuable consideration or not, but good and effectual at law, except for want of registration, and which is lost before registration, will set up in equity and a decree made for another conveyance by the bargainor or his legal representatives. *Plummer* v

Baskerville, 252

5. But, before such a decree can be made, the plaintiff must clearly prove that such a deed once existed, its legal operation and its loss. *Ibid*

6. In the case of a deed thirty years old, proof of its execution is dispensed with. But to render such a deed admissible, there must be some account of its proper custody, and also evidence that the party has been in possession under it. And the proof of execution is only dispensed with here on the ground that the attesting witnesses may be dead. *Ibid*

7. Conveyances which are absolute on their face must be held to be absolute, unless there be cogent and clear proof to the contrary, and something like mistake or fraud or undue advantage in getting such a conveyance established, as well as some evidence that the parties have acted in the business as upon a mortgage. *Lewis* v *Owen*, 290

8. But the form of the deed is not conclusive. The argument from it may be answered by a variety of circumstances; as, if the price was grossly inadequate, or, though the inadequacy were not gross, if the state of the possession indicated a continuing interest in the apparent vendor, or if what was called the purchase money was secured by the bond of the vendor, or interest was paid, or the like. *Ibid*

9. In ascertaining whether a deed given by A. to B. for a tract of land was intended to be a full and absolute conveyance of all A.'s interest, or only as a security for money advanced by B. to A., a great disproportion between the value of the land, and the sum paid for it, is strong evidence that the deed was given as a security merely. *Howlett* v *Thompson*, 369

10. The court decides, upon the parol proof in the case, in opposition to the defendant's answer, that there was a defeasance to an absolute bill of sale for a negro by the plaintiffs to the defendant, by which the defendant was to reconvey the negro on being re-paid the sum he had advanced the plaintiffs—and decrees that the plaintiffs may redeem the negro upon paying the principal advanced and interest thereon, deducting the hire of the negro since he came to the defendant's possession, and orders an account upon that principle. *Bethune* v *Terry*, 397

11. When two parties meet to conclude a contract for the purchase of land, and, the deed being present, one says "I offer this deed to you," and the other replies "I accept it," this amounts to a delivery, although the deed does not pass from the hand of the one to that of the other, but remains in the possession of a third person, the friend and agent of each. *Waddell* v *Hewitt*, 475

See FRAUD, 1, 2—CONTRACT, 1.

DEVISE.

1. Where a testator, after giving to his wife for life a certain

plantation and negroes, directed in a subsequent clause that his estate should be kept together on his lands and plantation, ("not left to his wife") for a particular time, and that the profits which had accrued during that time, should be divided between his daughter E. A. and his grandson J. T. G.; and then in several distinct sections proceeded to limit his estate, real and personal, in and among his family, upon the happening of certain contingencies; and then in another section devised and bequeathed as follows: "I further will, that at the death of my wife all that estate left her during her natural life, both real and personal, be equally divided between my daughter E. A. and her children, and my grandson J. T. G.; provided he shall have attained the age of twenty one years, to them and their heirs forever," *it was held*, upon its appearing that the daughter died without children in the lifetime of the tenant for life, but after the grandson had attained the age of twenty one years, that the remainder in the property given to the wife for life, was not affected by any clause of the will but the last, and that by that clause a moity of the remainder in the slaves vested in interest in the daughter, either immediately upon the death of the testator, or, at least, upon the coming of age of the grandson, so that upon the death of the daughter, her husband was entitled to claim the same as her administrator. *McAlister* v *Gilmore*, 22

2. A. devised as follows: "I give and bequeath all my estate, real and personal, to my son L. C. to the support of him and his brother G.; that is, that G. gets no more than what support him equal to L. C. should he not be extravagant." *Held* that the legal estate in all the property vested in L. C. but a moity of the beneficial interest belonged to G. *Carson* v *Carson*, 32

3. A. devised, among other things, as follows: "It is further my will and desire that all my children, those of my first wife, to wit, B. C. and D. and those of my second wife, to wit, E. and F. shall be equally provided for in property and their estates upon their arriving at full age respectively, to be as nearly equal as may be; and whereas under the will of Amos Gooch, dec'd, the three children of my first wife will be at my death entitled to the tract of land on which I now live and which is valuable, it is my will and desire that my executors select three good men, to value the said land on which I live, and then to value of my slaves, remaining after my wife's share is set off, a sufficient number to be equal in value to the said land, and that said slaves so valued be set apart by my executors, and it is my will and desire that they belong absolutely to my children E. and F. and that they be kept together undivided until the said E. and F. shall arrive at full age and then be equally divided between them." The testator, in a previous part of his will, had given to E. and F. the remainder in two tracts

of land, after the death of his widow; and the only other devise in his will to any of his children was, that the rest of his negroes and all the residue of his estate should be equally divided among all his children, after taking out what he gave his widow. *Held* that, under the clause recited, the children E. and F. took absolutely the negroes so directed to be valued and allotted to them, independent of what they were entitled to under the other clauses of the will, notwithstanding they would thus obtain a larger portion than the other children. *Jones* v *Paschall*, 430

4. A. by will, dated in 1838, devised his slaves to trustees, to be removed as soon as practicable to Africa and there settled in some colony, under the patronage and control of the American Colonization Society, with a proviso, that in case any of the said slaves should refuse to be so removed, the slave so refusing should be sold and the proceeds of the sale should be added to the fund created for the removal and support of such slaves, as should be removed with their consent. He then devised as follows: "It is my will and desire that the land and plantation about three miles west of Raleigh and the several lots of land comprising my tan yard establishment, together with all my crop, stock of every kind, plantation tools and carriages, implements for tanning and currying, household and kitchen furniture belonging to me at the time of my death be sold by the said (Trustees) or the survivor of them—and the proceeds of such sale shall constitute a fund to defray the expenses incidental to the removal of my slaves to some colony in Africa under the patronage and control of the American Colonization Society, and for the establishment of said slaves in such colony after their removal to the same." The testator then devised all the residue of his estate in the State of North Carolina to the same trustees, for the purpose of erecting and endowing an Infirmary or Hospital for the sick and afflicted poor of the City of Raleigh. It was held—*First*, that a stock of leather, which the testator had in his tanning establishment at the time of his death, passed under the clause devising certain property to be sold and the proceeds to constitute a fund for the removal and establishment of his slaves; *Secondly*, that not only so much of the fund provided by this clause as is *necessary* for the removal of the slaves, but the *whole* fund is appropriated to their removal, and also to their comfortable settlement in Africa—and that none of it falls into the residuum. *Thirdly*, that this devise is good as a devise to a charitable purpose, and it is not against the policy of this State, to permit the emancipation of slaves, provided they be removed and be kept removed out of the State. *Cameron* v *Commissioners of Raleigh*, 436

See LEGACIES—CONVERSION—HUSBAND AND WIFE, 2, 4, 5.

ELECTION.

Election may be enforced against *femes coverts* and infants between two inconsistent rights, where there is a clear intention of him, under whom one of them is derived, that *both* shall not be enjoyed, and when it is against conscience to enjoy both. *Robertson* v *Stevens*, 247

EMANCIPATION.

See Devises, 4—Legacies, 7.

EMBLEMENTS.

See Tenant for Life.

EVIDENCE.

1. If a cause be set down for hearing, upon the bill, answer and exhibits; a deed which is filed as an exhibit is evidence for the plaintiff, though it be not admitted in the answer. *White* v *Green*, 45

2. Whether the receipts of a wagoner for goods sent to a factor, are, after the death of the wagoner, competent to prove the delivery of the goods to the factor—*Qu?* but if they are competent for that purpose, they can only raise a probability of the delivery of the goods, which may be repelled by opposite probabilities, as, that accounts appear to have been rendered by the factor which the principal withholds, and which, if produced, would include the articles sent by the wagoner, and would be better evidence of the delivery to the factor. *McLin* v *McNamara*, 75

3. Before a decree, one defendant in equity may, as a matter of course, upon a proper allegation for that purpose, obtain an order for the examination of his co-defendant, as to matters in which the latter is not interested, saving to the plaintiff all just exceptions. This order will not be discharged upon a suggestion, that from the answer of the defendant to be examined, he appears to have an interest, but the objection must be reserved until the deposition is offered in evidence, when it will be a good exception that the witness examined has an interest in the matters examined adverse to the exceptant; and if this appear, his deposition cannot be read. But it is not a good exception that he has an interest in any other matters embraced in the cause, unless it can be seen that these matters will be affected by his examination. *Williams* v *Maitland*, 93

4. After a decree, it is not a motion of course for one defendant to examine another, and a special ground must be laid for it. And it seems to be such a special ground, after a decree against two co-executors to account, that the one sought to be examined, had alone received the money of the estate. *Ibid.*

5. The presumption that a due-bill, professed to have been given upon a settlement of all the accounts between the parties up to the time of its date, included a particular account up to that time, repelled by evidence,

showing that it was not embraced in the settlement. *Ibid*

6. An *ex parte* affidavit of the payment of money, made by the person who received it, and who died before the filing of the bill, if not admissible as *testimony*, is admissible as his *receipt*. *Ibid.*

7. Where there are several co-defendants in Equity, who have a common interest, the declaration of one of them is evidence against the others. *Griffin* v *Pleasant*, 152

8. An answer directly responsive to the bill, is evidence for the defendant. *McDonald* v *McLeod*, 221

9. There is no legal presumption, nor ought there to be an inference in fact, from the mere circumstance of a person attesting a paper writing as a witness, that such witness was aware of the contents of the paper, and is therefore bound by it, when it affects his interest. *Plummer* v *Baskerville*, 252

10. The force of circumstantial evidence depends on the number, tendency, agreement and conclusive nature of the circumstances in themselves, which may be adduced to establish a conclusion, and also on the important fact that there are not opposing circumstances, equally undeniable, which are inconsistent with that conclusion; and further, that nothing in the party's power appears to be withheld, which, if produced, would show the facts on which the conclusion is founded to be different, or authorise an opposite deduction from them. *Ibid.*

11. The answer of a defendant, directly responsive to the allegations and interrogatories of the bill, is evidence for him, which must stand, unless overborne by the testimony of two witnesses, or its equivalent. *Lewis* v *Owen*. 290

12. The plaintiff in Equity cannot read the deposition of one defendant against another, when he, whose deposition it is proposed to read, has an interest to subject his co-defendant. *Ibid.*

13. And the plaintiff cannot in any case read the deposition of a defendant, unless it has been taken under a special order of the court obtained for that purpose. *Ibid.*

14. Examining a party is an equitable release to him as to the matter to which he is examined. *Ibid.*

15. If the party examined be the one primarily liable to the plaintiff, and the other defendant only secondarily, the plaintiff necessarily gives up his claim against both by the examination of the former. *Ibid.*

16. Every decision of a competent court must be deemed to be according to the law and the truth of the case, until the contrary is shewn. *Wade* v *Dick*, 313

17. Where there is no allegation or interrogatory in the bill to which the defendant's answer is directly responsive, as when the defendant alleges a payment, about which nothing is alleged or asked in the bill, the defendant's answer is not evidence for him. *Jones* v *Jones*, 332

18. Where the allegation of the plaintiff is, that his father gave to him, while he was yet a tender infant, by deed, by way of advancement, nearly all his property, real and personal, leaving scarcely anything for his own support or that of his wife, or of the children he might thereafter have, the proofs to support such an allegation, before it will receive the countenance of the court, must be stringent and entitled to full confidence. *Parker* v *Hinson*, 381

19. When a surety sues a co-surety, who has guaranteed him, for the whole amount of a debt, which the former has paid for the principal, the principal is excluded from being a witness for the co-surety to prove a payment by himself to the surety, who sues, on the ground of interest—for, in addition to his liability to either for the debt, he is also liable to the co-surety for the costs incurred in the suit against him. *Davidson* v *Woodruff*, 467

See LEGACIES—FRAUD, 3, 4.—DEED—PRACTICE, 4.

EXCEPTIONS TO MASTER'S REPORT.

See PRACTICE, 1, 2, 3, 9.

EXECUTORS AND ADMINISTRATORS.

1. Executors and Administrators will not be held responsible for paying debts against their testator's or intestate's estate, which they might have avoided, by advertising for creditors under the act of 1789, (See 1 Rev. St. ch. 46, sec. 16, and ch. 65, sec. 12,) and pleading the act in bar of their recovery, if the debts so paid were honestly due. But the executors and administrators ought in prudence to comply with the requisitions of the act; and if by failing to do so, they subject the estate to the payment of *what it does not owe*, they, and not the estate, shall bear the loss. *Williams* v *Maitland*. 92

2. If the executor of a surety for a firm, upon the insolvency of a known partner, pay the debt, he shall not be charged with it in account with his testator's estate, because of his not bringing a suit for the recovery of the debt against another person supposed to be a partner, where there is no good reason to believe that the fact of that person's being a partner could be established by proof; and more especially ought he not to be so charged, where such supposed partner was generally deemed to be insolvent. *Ibid.*

3. Where it is shewn, that a part of the effects of an estate inventoried by two co-executors, has been wasted, and a part of the debts, which, by due diligence, might have been collected, has been lost to the estate, *quere* as to the extent of each executor's liability? But where the debts are actually collected by one executor only, and the product of the sales of the estate, whether the sales were made by one or both of the executors, is re-

ceived by the same executor, and there is no waste unless it be from the misapplication by that executor of the funds thus rightfully in his hands, it is well settled that a *devastavit* by him shall not charge his companion who has not actively contributed thereto. *Ibid.*

4. It must be a plain case of neglect of duty, which makes an executor responsible for a loss, by holding on to stock in a steamboat company, *bona fide*, and in the exercise of his best judgment. Nothing more than perfect honesty and reasonable diligence ought to be required of trustees; and it would be against conscience to require of an executor an indemnity against his testator's estate sharing in the loss which befell all, or nearly all, who adventured with him in the speculation. *Ibid.*

5. Where a guardian died indebted to his ward, and some years afterwards a judgment was recovered against his executor for the amount, to satisfy which, the testator's slaves were sold at a less price than they would have brought, had they been sold for the satisfaction of the debt soon after the testator's death, *it was held*, that the executor, if he could be held responsible at all for the unforeseen and indirect calamity of a depreciation in the price of the slaves, could not be so held, where no fraud was alleged or pretended, and it was not shown that he knew of the existence of the debt and the necessity for the sale, before the matter of the claim was put into the train of judicial investigation, or that there was any delay in getting a decision upon the claim. *Ibid*

6. An executor has an honest discretion to plead, or not to plead, the statute of limitations to a claim against his testator's estate. *Ibid*

7. An administrator is entitled to call upon the personal representatives of a deceased co-administrator, where it appears there has been no settlement between them, for an account of their joint administration, and for his proper share of the commissions received by such co-administrator. *Moffit* v *Moffit*, 124

8. An executor or administrator cannot, according to the rules of equity, make a valid sale of the assets of his testator, as a security for, or in payment of his own debts. *Powell* v *Jones*, 337

9. Where land was sold at public auction by an executor under a power in the will, for half of its value, and the sale acquiesced in, and made in accordanec with the feelings of those interested, a bill cannot be supported to set aside the sale, when they become subsequently dissatisfied. *Spainhour* v *Walraven*, 362

See LEGACY, 16, 17—SURETY—TIME.

FRAUDS & FRAUDUMENT CONVEYANCES.

1. A. sold to B. (of whom the defendants are heirs) a tract of land for a certain consideration, received the consideration, and

signed, sealed and delivered a deed for the land to B. in fee simple. Before the deed was registered or proved, A. and B. rescinded their contract. A. returned to B. the consideration he had received, and B. promised to re-deliver the deed to him, but he did not do so. A. then sold the land to C. (the present plaintiff,) and made him a proper conveyance for it. B. dying soon after, his heirs caused the deed to him to be proved and registered, brought a suit, and ejected C. out of his possession. *Held by the court* that A. and B., before the deed was perfected by probate and registration, had a right to rescind their contract; and that if, after this was done, B. or his heirs caused the deed to be proved and registered, it was a fraud upon A. or his subsequent assignee, and that the heirs should stand as trustees for such assignee, and be compelled to convey to him their legal title.
Love, v *Belk* 163

2. *Held also*, that no proof of fraud or imposition on the part of C., the assignee, in inducing A., the owner of the land to make the assignment, could be available to the defendants, the heirs of B., but that such proof could only be relevant in a suit between C. the assignee, and A. the assignor or his heirs. *Ibid*

3. *Held further*, that although proof of the rescission of the contract between A. and B. had been offered and received in an action of ejectment between B. and C., yet that such proof was not properly admissible on such trial, at law, as it did not affect the legal title of B., but that in this court it was admissible and relevant to shew a trust in B. or his heirs; and that therefore the verdict in the ejectment suit was not a bar nor an estoppel to the plaintiff in this court. *Ibid*

4. A debtor, upon being applied to by a *bona fide* creditor, to secure him by a deed of trust on his property, refused to secure any part of the debt, unless the creditor would transfer one half to a trustee for the benefit of the debtor's wife and children; and that the half so transferred should also be secured by such deed. The creditor, though reluctantly, consented; the transfer was made, and a deed of trust executed according to such agreement. *Held* that this was tantamount to a reservation by the debtor himself, of so much of his property for the use of his wife and children, and was therefore fraudulent and void as against other creditors.
Kissam v *Edmonson*, 180

5. Whether the trust in favor of the creditor for the one half of the debt retained to himself is not also void, because of his being a party to such arrangement. *Quere?* *Ibid*

6. A conveyance, after marriage, by a debtor to his wife or children, or in trust for them, is void against prior creditors; and that without regard to the amount of the debt, or the circumstances of the party making the conveyance. *Ibid*

7. A creditor may, out of a debt

due to him or any property belonging to him give a bounty to the family of his debtor; but it must be a voluntary act, not coerced by the debtor, nor made the price of any favor or preference by the debtor towards such creditor. *Ibid*

See GUARDIAN AND WARD, 24—JURISDICTION, 20—PARTNERSHIP, 1—GIFTS.

GIFTS.

Where the plaintiff alleged that the testator of the defendant had, in his last illness, made her a gift of a bond, which was not endorsed, and that he had made this gift in consideration of her nursing and attending to him, and also because of his former co-habitation with her; & where it appeared that, for some months before his death, she had attended upon him, and had access to his papers, *held*, by the court, that to establish such a gift, the evidence must be full and satisfactory; and that the policy of the law, preventing fraudulent testamentary dispositions from being set up, would be frustrated, if such gifts were established upon vague, slender or doubtful evidence. In the present case, the court refused, upon the proofs, to decree for the plaintiff. *Shirley* v *Whitehead*, 130

GUARDIAN AND WARD.

1. An *ex parte* order of the County Court, under the Act of Assembly, (Rev. St. c. 54, s. 22,) allowing commissions to a guardian, is not conclusive in a litigation between a ward and his guardian in this court. *Walton* v *Erwin*, 136
2. The jurisdiction of the County Court on the subject of commission to guardians is not exclusive; but like other matters of account between guardians and wards, has always been exercised by the Courts of Equity. *Ibid.*
3. Where a guardian had received nearly the whole of his wards' estate in notes, made payable to him as guardian, by the administrators of those of whom the wards were distributees, had held these notes until he resigned his guardianship after a period of six years, had collected but little interest on the notes, and had then paid them over to a succeeding guardian, *held* that two and a half per cent. was an ample commission. *Ibid*
4. Possibly there may be cases, in which, the office being troublesome, and the guardian faithful, and dying or giving up this office upon some necessity, the court may give to the former guardian a full commission, & also reasonable compensation to his successor. But the case ought to be remarkable in its circumstances to justify such a proceeding. *Ibid*
5. In a suit in Equity against a guardian for an account, the allowance of commissions has always been made in the first instance in that court, *Ibid*
6. Guardian accounts, passed by a county court, have never been pleaded in bar to a suit in Equity. *Ibid*
7. Commissions are only a compensation to the guardian for his time and trouble in manag-

ing his ward's estate. *Ibid*
8. On an *ex parte* proceeding before a county court in a case of guardian accounts, an omission or unjust charge is evidence of surprise or imposition on the court. *Ibid*
9. A guardian, who permits his female ward to marry under the age of fifteen years, cannot, for that reason, be held accountable as trustee for the wife, after the marriage, and after he has delivered over the property to her husband. *Shutt* v *Carloss*, 232
10. The guardianship ceased upon the marriage, for the statute (Rev. St. c. 71. s. 7, and c. 34. s. 47,) does not declare such a marriage void, but only subjects the husband, *upon conviction*, to certain penalties, and to the loss of his wife's property. *Ibid*
11. A guardian is not bound to have a marriage settlement made in favor of his female ward under any circumstances, even when she has a large estate, and is about to marry a man of slender fortune. *Ibid*
12. Nor is he answerable in pecuniary damages for marrying his female ward "in disparagement." *Ibid*
13. Inequality of fortune never constituted "disparagement." Thereby was contemplated some personal or social defect or disqualification, &c. *Ibid*
14. An application by a guardian to a court for permission that his infant female ward should marry, is wholly unknown to our usages. *Ibid*
15. Compensation cannot be allowed, independent of his commissions, to a guardian for his *time* and *trouble*, but these are to be considered in fixing the quantum of his commissions. *Ibid*
16. Where one takes, by assignment, a note, due and payable to the guardian of an infant, as guardian, and not in payment or discharge of any debt or demand due by the infant, he is held in equity to be answerable to the infant either for the note or for the amount of it. *Powell* v *Jones*, 339
17. And this assignee is thus answerable to the infant, though the latter may have obtained a judgment against the sureties on the guardian bond, embracing this note—and though the said sureties may have been indemnified by the transfer of property in a deed of trust to secure them against loss. *Ibid*
18. Where a man takes a bond by assignment from the guardian of an infant, the bond being payable to the assignor as guardian, the assignee is considered in equity as holding the bond in trust for the infant, and must account for it accordingly. And the sureties on the guardian bond have the same right, as the ward, when they have paid the surety money. They then stand in place of the ward. *Fox* v *Alexander*, 340
19. A guardian of infants, having bonds payable to him, as guardian of the wards, transferred them without endorsement to one of his creditors, as a security for his own debt, and became insolvent. *Held* that the assignee, having notice that the

debts belonged to the wards, acquired no right by the assignment, and a Court of Equity will restrain him from collecting the debts and compel the debtor, who is made a party to the bill, to pay the amount to the infants. *Lockhart* v *Phillips*, 342

20. In such a case full costs are awarded against the guardian and the assignee. *Ibid*

21. Guardians of lunatics are responsible for compound interest in the same manner and to the same extent as guardians of infants; and bonds, &c. payable to them as guardians, bear compound interest in the same manner as bonds payable to the guardians of infants. *Spack* v *Long*, 426

22. Where a guardian purchases land of his ward, soon after he comes of age, at a grossly inadequate price, the guardian having sought the purchase, and taking advantage of the imprudence and thoughtlessness of the young man, the contract will be rescinded in a Court of Equity, upon a bill filed for that purpose against the guardian. *Williams* v *Powell*, 460

23. Between persons standing in that relation to each other, only fair and equal bargains ought to be supported. *Ibid*

24. Unequal contracts between a guardian and his late ward, just come of age, are set aside, upon a ground of public utility, and to *prevent* fraud, not merely to *redress* it. *Ibid*

See AWARD—JURISDICTION, 10. 11.—PARTIES, 1.

HUSBAND AND WIFE.

1. If a man marry a woman having an interest as next of kin, in slaves bequeathed for life, and die after the death of the tenant for life, but before reducing the slaves into possession, his wife, and not his representative, will be entitled to them. *Hardie* v *Cotton*, 61

2. Where real estate was devised in fee to a woman, who afterwards married, but it was directed in the will that the possession should be retained by A., a third person, and the rents and profits received by him until a certain debt was paid, *held* that the interest of this possessor could not be regarded as of a higher character than a term or chattel interest, that the possession of a termor is the seizen of him who hath the inheritance, and that in such a case, the wif having had issue born during the marriage, the husband is entitled to be tenant by the curtesy. *Robertson* v *Stevens*, 247

3. A legacy given to a married woman, or a distributive share falling to her during coverture, and not received by the husband, or disposed of by him in his life-time, survives to the wife. *Poindexter* v *Blackburn*, 286

4. A testator bequeathed in one clause of his will, as follows: "Having heretofore given and conveyed to my daughter Ann Davis, and her husband Edward Davis, a large and valuable real estate, besides sundry personal chattels, I do now hereby confirm the same. And I do hereby devise to my son William Cain in trust for the *separate*

and sole use of my daughter Ann Davis and her children the sum of $4000, which sum of money shall be laid out by the said William, his heirs, executors, &c. in such ways as he or they may deem best for my daughter Ann Davis and her children, and for their sole and separate use and benefit." After giving to other persons some legacies of slaves, he again devises as follows: "All the rest of my slaves not before given or devised, I give and bequeath to my son William Cain, my son-in-law Willie P. Mangum, my daughter Polly Southerland, and my son William, *in trust* for my daughter Ann Davis and her children, to be equally divided between them share and share alike." In a subsequent clause, after directing his debts, &c. to be paid, he says: "And the balance remaining thereafter, I give and bequeath to my son William Cain, Willie P. Mangum, Polly Southerland, and to my son William, in trust *for the sole and separate use* of my daughter Ann Davis and her children, to be equally divided among them share and share alike." The husband Edward Davis claimed by virtue of his marital rights all the interest bequeathed to his wife in these several clauses. *Held* by the court that all the interest bequeathed to Ann Davis, the wife, in these clauses, was *to her sole and separate use*, and that the husband was excluded, though if the second of the above mentioned clauses had stood alone, the construction as to that would have been different. *Davis* v *Cain*, 304

5. Though the intention in a devise to a wife to exclude the husband must not be left to inference, but must be clearly and unequivocally declared, yet when that intention is clearly ascertained by the court, it will be carried into execution, though the testator may not have expressed himself in technical language. *Ibid*

6. A husband and wife having parted and become afterwards reconciled, Steel, the husband, by deed, conveyed to Mebane certain slaves, lands, &c. "in trust that said Mebane should hold the said land, slaves, &c. to the use of Nancy, the wife, for and during her natural life, and after her death, to the use of her children by the said Steel; and the said Mebane, in execution of the trusts hereby intended to be created, may lease out the lands and hire out the negroes aforesaid, and sell the household and kitchen furniture, stock of cattle, horses and sheep, or any part thereof, and place the money out at interest, or apply the same towards the maintenance of the said Nancy during her life; it being the object and intention of the said Steel to settle in the hands of the said Mebane a decent maintenance and support for his wife Nancy over and above her claims to dower, and to secure an interest in the property aforesaid in remainder to the children of the said Steel on the body of the said Nancy begotten." *Held* that by this deed

the wife took, in equity, an estate in the property to her *sole* and *separate* use. It necessarily follows, when a husband makes a conveyance to a trustee for the use of his wife, that it is for her *sole* and *separate* use. *Steel* v *Steel*, 452

7. If there be an express gift to the husband by the wife of her separate estate, or if one can be implied, as from the receipt by him of the income of her estate by her direction or permission, and employing it in the support of his family, including the wife; in such cases, the wife cannot charge the assets of the dead husband for the money thus received and applied; or, at most, for not longer than the year next before his death. *Ibid*

See CONVERSION, 3—GUARDIAN AND WARD, 9, 10—MISTAKE—MARRIAG SETTLEMENTS—TRUST AND TRUSTEE, 6, 7, 8, 9, 10.

ILLEGITIMATE CHILDREN.

1. If the putative father of bastard children procure a private act of Assembly to be passed to alter their names and to legitimate them, and the act, after reciting that they are his illegitimate children, declares that they shall be legitimated and made capable to take, possess, enjoy and inherit any estate, either real or personal, which may be devised or descend to them, in as full and ample a manner, to all intents and purposes, as if the said children had been born in lawful wedlock, it makes the children legitimate to the person who is recited in the act to be their father, though there is no express declaration that they shall be legitimated to him. *Parry* v *Newsom*, 28

2. The agency of the father in procuring such an act to be passed, cannot affect its construction, but it may be material to give effect to it, and make it operate on his property. *Ibid*

3. Whether the Legislature can, by a private law, before the death of the owner of an estate, annul the capacity of one person to succeed, and confer it on another without the consent of the owner—*Qu?* But if it can, it is not presumed to have so intended, without an explicit manifestation of such intent. On the contrary, the general principle is, that private acts are in the nature of assurances at common law; and, therefore, that their operation is meant to depend on the consent of those persons who are in *esse*, and whose estates are the subjects of the acts. *Ibid*

INCREASE OF CATTLE &c.

See TENANT FOR LIFE.

INJUNCTION.

1. Threats to remove slaves out of the State, by one having only a limited interest in them, though idle, may afford the absolute owner a ground for claiming security to prevent their removal; but as the defendant was a man of unembarrassed fortune, the court only

directed an injunction to that effect. *Wilcox* v *Wilcox*, 36

2. Where in an injunction case there is a probability, from the facts stated in the bill, and not denied by the answer, of the plaintiff's sustaining his claim for relief, a motion to dissolve the injunction, upon the coming in of the answers, ought not to be granted. *Sherrill* v *Harrell*, 195

3. It is not proper to say, "the case *coming on to be heard* upon the bill, answer, exhibits, &c., it is ordered and decreed that the injunction be continued *until the hearing*"—because here is an absurdity in terms, and a cause can only be *heard* when it is regularly set down *for hearing*, according to the course of the court. A motion to dissolve is a mere motion in the progress of the cause, preliminary to its hearing. *Ibid.*

4. On a motion to dissolve an injunction, usually the court can look at nothing but the answer and the exhibits filed and admitted by the answer. If the facts and circumstances, which make the plaintiff's case are denied, the injunction falls of course. *Moore* v *Reed*, 418

5. The summary remedy on injunction bonds, given by the act of Assembly, (1 Rev. St. c. 32, s. 13) upon the dissolution of the injunction, apply only in cases of injunctions to restrain executions on judgments at law. In other cases of injunction, the oper remedy is by a suit at common law on the bond *Ibid*

6. After a bill and answer have been filed in court, it is irregular to grant an injunction in the case upon a petition to a Judge in vacation. If an injunction is desired because of any new matter arising, such matter should be disclosed by a supplemental bill. *Ibid*

See REMAINDER IN SLAVES.

INTEREST.

Where one transaction between two persons, becomes an item in account between them, in consequence of their subsequent dealings as principal and factor, and as such, is taken out of the operation of the statute of limitations, by the acknowledgment and promise of the factor to settle the account, interest cannot be claimed on the first item, unless it can be claimed on the transactions between the parties as principal and factor, and that cannot be done where there are circumstances of laches and unfairness on the part of the principal.—Under such circumstances, interest is allowable only from the time of bringing the suit. *McLin* v *McNamara*, 75

See GUARDIAN AND WARD.

INTERPLEADER.

1. A Sheriff, who has seized property under an execution, which is claimed by other persons besides the defendant in the execution, cannot sustain a bill in equity requiring these persons

and the plaintiff and the defendant in the execution to interplead, so that their respective rights may be ascertained. *Quinn* v *Green*, 229

2. In a bill of interpleader, the plaintiff must always admit a title as against himself in all the defendants. A person cannot file such a bill, who is obliged to state, that, as to some of the defendants, he is a wrongdoer. *Ibid*

JURISDICTION.

1. If a plaintiff in a suit at law be taxed with more costs than he is legally bound to pay, his remedy is by a motion in the court of law for a re-taxation of the costs; and he cannot, after neglecting to avail himself of this remedy, have relief in equity. *Wells* v *Goodbread*, 9

2. If an administrator be sued upon notes and bonds of his intestate, pending an action previously commenced against him upon a covenant of his intestate, he should plead the pendency of the action on the covenant, and that the assets would be liable in the first instance to the recovery in that action, if effected; and no assets *ultra*. And if he neglect to avail himself of such defence, he cannot afterwards have relief in equity. *Ibid*

3. Where a party has a plain remedy at law and neglects to avail himself of it, he has no right to ask relief in Equity. *Ibid.*

4. The charge of "ill treatment" by a wife against her husband is too vague to be the foundation of a judicial sentence. *Wilcox* v *Wilcox*, 36

5. If a mere tenant at will, or tenant from year to year, who is under no mistake with regard to the nature of his title, make improvements and lay out his money upon the estate without the request of his landlord, neither he nor his creditor has any equity against the landlord for such improvements. *Pomeroy* v *Lambeth*, 65

6. When one person stands by and induces another to lay out money upon his property, under a supposition that he has a right, he will be bound by the facts, as he causes them to be understood. *Ibid*

7. If a note be lost, the acceptance of a negotiable instrument expressly in payment of it, amounts in law to a satisfaction, and may be so pleaded, and the debt being thus extinct at law, there can be no relief in equity upon the lost note. *Smitherman* v *Kidd*, 86

8. If a bond be lost, whether the acceptance of a negotiable instrument under seal from the principal obligor, expressly in payment of it, be a satisfaction at law or not, the obligee cannot recover in equity, on the lost bond, against the principal obligor or his surety, contrary to his agreement. *Ibid*

9. If a vendor receive in payment for the sale of land, the bond of a third person made payable to himself, which is afterwards altered by his assent so as to de-

stroy it at law, he cannot have relief in equity against the obligor, although he was ignorant of the legal effect of altering the bond. Nor can he, or his assignee, who purchased the bond with full knowledge of the legal objections to it, have any relief in equity against the vendee who gave it in payment, though the latter made the alteration in the bond, and represented it to be good. *Ryan* v *Parker*, 89

10. Where it appeared from the records of the court that A. B. was appointed guardian to C. D. and gave bond with E. F. and G. H. as his sureties, *it was held* that the principal and sureties intended to execute a guardian bond in such form and substance as would have been good at law, (notwithstanding the defendants in their answers deny such intention,) and that the bond drafted by the clerk (which was afterwards declared to be a nullity at law) was drawn wrong, through the mistake or ignorance of the clerk. *Armistead* v *Bozman*, 117

11. *It was further held* that this was a mistake of fact, and not of law, and that as in this case, the paper writing purporting to be a bond, had been declared at law a nullity, in consequence of its being made payable to the justices of the county, when one of the obligors was himself one of the justices, the ward for whose benefit the bond was intended to be taken, had a right to call in this court upon those who signed as sureties as well as upon the principal, and make them answerable for whatever might appear to be due the ward on a settlement of the guardian accounts, to the same extent to which they would have been liable at law, if the bond had been good and available at law. *Ibid*

12. A decree in Equity cannot *per se* divest a title at law, but can only compel the person who has the title and who is mentioned in the decree, to convey. *Proctor* v *Ferebee*, 143

13. Where a plaintiff obtains a judgment at law, which becomes dormant, it is not necessary to revive it in order to enable him to apply to a court of equity for its aid, in procuring satisfaction of the judgment. *Brown* v *Long*, 190

14. It is generally necessary to issue an execution at law, before coming into this court for its aid, 1st, because, where the object is to clear the title of property, alleged to be subject to execution, from incumbrances, &c. the execution must be issued, that it may create a lien on that specific property—2dly, that it may appear, from the return of *nulla bona*, that the defendant has no property which can be reached by an execution at law. But no further execution is necessary where the defendant has been once taken on a *ca. sa.*, and discharged under the insolvent debtors's law; and where he admits, in his answer to the bill, that he has nothing tangible by an execution, but only *choses in action* held in trust for him. *Ibid*

15. A creditor, who has a legal

claim, must establish it at law and pursue the legal remedies, before he can ask the aid of this court. *Ibid*

16. Where the plaintiff does not prove to the satisfaction of the court, that his contract has been obtained from him by mistake, or by imposition, misrepresentation, fraud or surprize on the part of the defendant, this court cannot relieve him, although they may believe he has been hardly dealt with. *Gunter* v *Thomas*, 199

17. That the plaintiff entered into his agreement to avoid a controversy at law; that he was ignorant of the law, and was alarmed by the defendant issuing against him a writ of *ne exeat*, when it does not appear that the defendant sued out that process with an improper object, constitutes no ground for relieving him from a contract voluntarily and deliberately entered into. *Ibid*

18. The surety for an appeal, in an action at law, from the county to the Superior Court, cannot have the case re-examined in a court of equity, upon the allegation that the verdict and judgment at law were unjust; unless it also appears that by concert and collusion between the plaintiff and defendant at law such unjust judgment was suffered, for the mere purpose of charging the surety, when the principal was not really chargeable by reason of his insolvency: Or unless he alleges a ground upon which the defendant at law himself could have had the judgement re-examined in a Court of Equity. *Piercy* v *Piercy*, 214

19. If the consideration of a bond be against law, the obligor may make that defence at law and can have no claim on that account for the interposition of a Court of Equity. *Moore* v *Anderson*, 411

20. A creditor cannot in equity charge third persons with fraudulently holding the property of his debtor, until he has first established his debt by a judgment at law, and endeavored by execution to satisfy that judgment. *Peeples* v *Tatum*, 414

See MISTAKE—AWARD.

LAPSE OF TIME.

See TIME—LIMITATIONS, STATUTE OF.

LEGACIES.

1. A bequest in the following words: "I have one bond on John, given the 3rd of January, 1837, for $300, I will and bequeath to my son J. L's children," will pass a bond on John Simpson for $300, dated the 13th of January, 1837, where it appears from testimony *dehors* the will, that the testator had but the one bond. *Simpson* v *King*, 11

2. Where a testatrix directed her negroes to be sold in families, not to speculators, but to persons purchasing for their own use, and "the money arising from the sale" to be invested in bank stock, the interest on the stock

to be paid two thirds to her sister, and one third to her brother, during their lives, and then the stock to be paid to another person, *it was held*, that though there was no direction in the will to that effect, yet the testatrix intended a sale of the negroes on a credit; that twelve months was a reasonable term of credit; that the interest on the purchase money accrued from the day of sale to the time of payment, was "money arising from the sale," to be invested with the principal in stock; and that the legatees of the interest on the stock, were not entitled to the interest accrued on the purchase before the investment. *Stone* v *Hinton*, 15

3. A bequest of a slave to one for life, and, at the death of the tenant for life, to be sold or made free, if his conduct should, in the opinion of the tenant, "merit such a distinction," will not give to the legatee a larger estate than for life. *Ibid*

4. Where a testatrix in her will, bequeathed certain bank stock to her nephew, G. D., and in a codicil declared as follows: "I desire that, in case the education and tuition of G. D. is withheld from me, not having confidence in those that now direct his ways, I give the bank stock before named and disposed of, to be divided between the said G. D., S. E. D. and E. M. D.;" and it appeared that the testatrix did not have the direction or control of the education and tuition of her nephew G. D., from a time anterior to the making of her will to her death, *it was held*, that the contingency mentioned in the codicil had happened, upon which the stock was to be divided between G. D. and the two other named legatees. *Ibid*

5. Where a testator bequeathed all his personal property to his four children, A., B., C. and D., to be equally divided between them, when his son A. arrived to the age of twenty-one years, "and if one or two or three should die under age, or without lawful issue, for all the property to go to the surviving ones for ever;" *it was held*, that upon the death of D., a daughter, before her arrival at full age, but after A. had attained twenty-one years old, her share would go over to her brothers then living; and that neither the child of a sister who had died after attaining full age, nor the next of kin of the testator, was entitled to any part of it. *Gregory* v *Beasley*, 25

6. Where a testatrix bequeathed "that all the balance of my property shall be divided between L. G., A. N., M. F., and A. and I. A. B. to draw one share; also M. and N. H. to draw one share," *it was held*, that the testatrix intended the residuum of her property should be divided into five equal shares, of which one share was to go to the two B.'s, and one other share to the two H.'s; and the three remaining shares to the three other named legatees: and *it was further held*, that I. A. B., one of the legatees, having died before the testatrix, his moiety of a share lapsed and went to the next of

kin of the testatrix; because all the legatees, whether taking whole shares or moieties of shares, would have been, if they had lived, not joint tenants, but tenants in common of the fund *Nelson* v *Moone*, 31

7. A bequest for emancipation prior to the act of 1830, 1 Rev. Stat. c. 111, s. 57, is inoperative, as is also a bequest of property, to the slaves directed to be emancipated, and if there be no residuary clause in the will, the slaves and the property bequeathed to them, will form an undisposed surplus, and be a fund for the satisfaction of the testator's debts and general legacies, unless there be an exemption of the residue, or the charge be fixed, by plain words or as plain implication, on other property exclusively. *White* v *Green*, 45

8. A bequest for certain slaves to be emancipated, after the death of the testator's wife, does not give to the wife an estate for life, by implication, in the slaves; and *it* seems that the doctrine that a gift by will to A. after the death of B., is a gift for life to B. by implication, does not, under any circumstances, apply to personal chattels. *Ibid*

9. It is a general rule that specific legacies do not abate with, or contribute to, general legacies; but if a general legacy be expressly charged upon a specific legacy, it is otherwise; or if a general legacy be given, and there never was any fund to pay it, except the specific legacies, owing to the fact that every thing is given away specifically, then the general legacy must be raised out of the personal estate, although specifically bequeathed; and this, though there may be a surplus which may be applied to the satisfaction, in part, of the general legacy, in consequence of some of the bequests being void. *Ibid*

10. Where a testator, after giving his manor plantation to his son, and two other plantations to his four daughters, and providing that all his lands should be rented, and his negroes hired out until his youngest daughter became fifteen years old, and that his children should "be educated and boarded out of the estate," proceeded as follows: "I likewise will, that at the time my youngest daughter S. T. arrives to the age of fifteen years, all my negroes, money and perishable estate, shall be divided between all my children. In case any of my children should be married before S. T. arrives at fifteen years of age, then my will is, that his or her board shall be stopped, and no further charge be paid for him or her until S. T. arrives to fifteen, when he or she shall receive his or her proportionable part; *it was held* that the legacies to the children were not vested, but contingent upon their living to the period when the testator's youngest daughter should arrive to the age of fifteen years, or, in case of her death, to the time when she would have arrived at that age had she lived, and that only those of the children who were alive at that period, could take. *Anderson* v *Felton*, 55

11. A provision for maintenance will not make a legacy vest, if the maintenance is not to absorb the whole amount of profits, or if it be not restricted to that as the only fund. *Ibid*

12. Where a testator lent to his wife for life his manor plantation and certain slaves, and gave to each of his children specific legacies of slaves, and directed "all the negroes which he had given away or lent," and also "all those which he had not given away," to be kept on his lands and worked upon certain specified terms, and added, "as my children shall come to the age of twenty-one years, or marry, it is my desire that they shall have the legacies already given away," and then proceeded as follows: "It is my will that my wife and children shall have the use of my plantation lying on Roanoke, until the year 1808; and if my wife should die before that time, it is my desire that an equal division of all my estate that is not given away should take place among my children then living at my wife's death or the time above stated, that is, land, negroes," &c; *it was held*, that as the wife and children all survived the year 1808, if the last clause of the will operated upon the negroes lent to the wife for life, the legacies of the remainder in them to the children, vested at that period; but *it was further held*, that the clause in question, in the events which happened, did not operate upon those negroes; that there was an intestacy as to them, and they vested in the executor in trust for the next of kin upon the death of the testator, subject however, in case the wife had died before 1808, to have been divested and divided, under the will, among the children then living. *Hardie* v *Cotton*, 61

13. Where a testator, after giving several pecuniary legacies, directed that his slaves, together with all his stock and other property of every description, should be sold, and the remainder of the monies arising therefrom, after paying the several legatees, should go to E. L.; and in a codicil added as follows: "I desire that all the negroes before mentioned, that are left to be sold, instead of credit, must be sold for cash down; and as soon as the money that is raised out of my estate, to be paid over to the legatees as soon as collected," *it was held*, that certain bond and notes which the testator had, and of which no particular mention was made in his will, were, after the payment of his debts, to be applied in discharge of the general legacies; and that the latter were not to be paid exclusively out of the sales of the negroes, stock, &c.; the remainder of which was given to E. L. *Boon* v *Rea*, 71

14. Where a testator bequeathed certain legacies to trustees for the sole and separate use of his daughter and her children, it *was held* that, on the death of the testator, each of these children took an immediate equal interest with their mother in the legacies so bequeathed. *Davis*

v *Cain*, 304

15. A bequest of "twenty five shares of the capital stock of the State Bank of North Carolina," the testator owning at the time that number of shares in the bank, is a general, not a specific legacy. If the testator had said "*my* twenty five shares &c." the legacy would have been specific. *Ibid*

16. A testator devised as follows: "I also leave in the possession of my executor my slave Hillman, to be disposed of as he may deem proper, to remain with him until he arrive at 18 years, at which time I hereby vest him with authority to sell him to the best advantage, and the money arising from such sale to be equally divided among my present grand-children." *Held*, that the executor was not bound to account for the hire of this negro, till he reached the age of eighteen years. *Rawles* v *Ponton*, 354

17. A devised to his wife, whom he also appointed his executrix, one thousand dollars during her life, and after her death to go to his children. The wife purchased negroes with this money, and they greatly increased in value. *Held* that the children, the remainder-men, had no right or interest whatever in these negroes, but that they belonged absolutely to the wife. The remainder-men had only a right to the thousand dollars after the death of the wife. Upon a bill stating that this sum could only be raised out of the negroes, the court would, during the life of the wife, decree that they should be held as a security for the capital sum. *White* v *White*, 441

See PARTIES, 1—DEVISE—HUSBAND AND WIFE, 3, 4.

LIEN.

See VENDOR AND VENDEE, 2—PURCHASER, 2.

LIMITATIONS, STATUTES OF.

1. Where the bar of the statute of limitations against an account of ten years' standing is repelled by an admission that the account is open, and a promise to settle it, the length of time will not, of itself, operate as a bar; but it may, connected with other circumstances, be sufficient to induce the court to require evidence of the claim so clear, consistent and natural, as to amount to positive, and almost conclusive, proof. *McLin* v *McNamara*, 75

2. Where one person sold to another certain articles of furniture, and afterwards sent him goods to sell as his factor, and ten years afterwards, the factor, in reply to his principal calling upon him for a settlement, acknowledged that the account was open, and promised to set it, *it was held* that the sale of the furniture was not an isolated transaction, which would be barred by the statute of limitations, but formed an item in the account when the parties proceeded in their other dealings,

and that, therefore, the letter of the factor repelled the effect of the lapse of time as to this, as well as to the other, parts of the demand. *Ibid*

3. The proper construction of the act of 1715, limiting claims against deceased persons' estates, (1 Rev. St. c. 65, s. 11,) is that the seven years do not begin to run, on the death of the debtor, unless there be a creditor who has a right at that time to claim his debt or demand. If the debt or demand is not then due, the seven years do not begin to run. *Armistead* v *Bozman*, 117

See EXECUTORS & ADMINISTRATORS, 6—TIME.

LUNATICS.

See GUARDIAN & WARD, 21—PARTIES, 6.

MARRIAGE SETTMEMENT.

Where, under a marriage settlement, the property of the wife was conveyed to a trustee upon trust, "to pay to, or to authorise and empower the husband to take and receive from time to time, during his life, as the husband of his said wife and not longer, or, after he shall so cease to be, the intesest, profits, and annual prooduce of the said property, to and for his own use, and that of his said wife, but so that the same is in no wise to be subject to his debts," *it was held* that the wife was entitled to a decent support and maintenance out of the means placed in her husband's hands, only so long as she remained living with him, unless he turned her away, or by intolerable ill usage compelled her to leave him. *Wilcox* v *Wilcox*, 36

See HUSBAND AND WIFE—MISTAKE.

MASTER'S REPORT.

See PRACTICE.

MISTAKE.

A woman previous to her first marriage, had settled to her sole and separate use certain negro slaves; her first husband died; the widow married a second time, and her second husband, having had possession of the said slaves, shortly afterwards died intestate, leaving one child: the widow, being about to marry a third husband, made a marriage settlement, and, being under the impression and so advised by her counsel, that the negroes secured to her separate use in the first marriage settlement, continued hers, notwithstanding her second marriage, and would continue to her separate use during her third marriage, settled upon her son by her second marriage *all* her distributive share of his father's estate. These negroes and the distributive share, as she then supposed it to be, constituted nearly all her property. After her third marriage, it being determined by the Supreme Court, that

the negroes included in her first marriage settlement, went absolutely to her second husband and constituted a part of his personal property, she and her husband filed this bill for relief. *It was held by the court* that they were entitled to relief on the ground of mistake, but to what specific relief the court would not now say, as the case came before them upon a demurrer to the plaintiffs' bill. *Watson* v *Cox*, 389

See JURISDICTION, 10, 11.

MORTGAGE.

See CONTRACT, 1—DEED, 1, 3, 7, 8, 9.

MULTIFARIOUSNESS.

1. To determine whether a bill is multifarious the enquiry is not whether each party is connected with every branch of the cause, but whether the bill seeks relief in respect of matters, which are in their nature separate and distinct. A bill is not multifarious, where all the plaintiffs have an interest on one side, and all the defendants have a common interest on the other, in the decision of the main matter of controversy. *Robertson* v *Stevens*, 247
2. A bill, in which several defendants are charged, is not multifarious, when the object of the bill is single in respect to the transaction out of which it arises, to the subject matter and to the relief; and when, though each defendant is not connected with the subject of dispute in the same manner, yet each is connected with the whole subject, and therefore properly brought before the court, that one suit may conclude the whole subject. *Watson* v *Cox*, 389

PARTIES.

1. A suit in equity for a legacy due to minors, must be brought in their name, and not in that of their guardian, though where the legacy is a debt against the guardian, and one object of the bill is to obtain an injunction against its collection, he may also be a party. *Simpson* v *King*, 11
2. It is not necessary to have the personal representatives of one, originally responsible as a surety a party-defendant, when there is now no living representative, and when the defendants in their answer admit that they have received, as heirs, legatees or distributees, all the property of the deceased, and submit to account for it, if they are liable at all. *Armistead* v *Bozman*, 117
3. Where a bill is filed against one of the sureties to a guardian bond to recover an amount due by the defalcation of the guardian, upon the ground that the bond has been destroyed by fire, and it appears on the pleadings that the principal is dead, insolvent, and has no personal representative, it is no objection to the bill that a personal representative of the principal is not made a party defendant. *Spivey* v *Jenkins*, 126
4. Nor is it any objection that the

other surety is not made a party, when it is charged, and so appears, that he is beyond the jurisdiction of the court. *Ibid*

5. The ordinary practice of Courts of Equity, where one of several parties is out of the jurisdiction and the others within it, is to charge the fact in the bill that such person is out of the jurisdiction, and then to proceed against the other parties; and this practice is not changed in our courts by the operation of the Act of Assembly, 1 Rev. St. c. 32. sec. 4. *Ibid*

6. A suit in equity to recover what belongs to a lunatic, may be brought either in the name of the guardian or committee, or in the name of the lunatic by his guardian or committee. *Shaw* v *Burney*, 148

See PRACTICE, 7.

PARTNERSHIP.

1. A bill filed by a creditor, charging that his debtor was a partner in a particular firm, and that he had purchased his debtor's interest therein, under an execution against him, and calling for an account of the partnership, cannot be sustained upon proof merely of a fraudulent sale or transfer of some of the goods to the firm by the debtor, because such sale or transfer will not make him a partner therein. *Shepherd* v *Truitt*, 33

2. Where a bill is filed for the settlement of co-partnership accounts, and a reference is made to the master to state accounts, he has a right to examine into and report the existence and the terms of the co-partnership, for otherwise he cannot correctly state the accounts. *Jones* v *Jones*, 332

3. When on such a bill the defendant admits an advance of capital on each side, an agreement for its management, for the payment of the charges out of the joint funds, and for a dividend of the profits, this is an admission of a co-partnership. *Ibid*

4. When in a co-partnership there is no specific agreement as to the division of losses and profits, they are to be divided equally. *Ibid*

5. It *seems* that, without some express stipulation to that effect, (untainted by usury,) a partner cannot charge interest on his advances, when he is to participate in the profits. *Ibid*

See EXECUTORS AND ADMINISTRATORS, 2, 4.

PETITION TO RE-HEAR.

1. As a petition to re-hear a cause does not *per se* stay proceedings on the decree sought to be re-heard, and when it is allowed, affords to the court an opportunity of correcting any injustice it may inadvertently or erroneously have committed, it is almost a matter of course, unless the application be unreasonably delayed, not only to receive a petition, but upon it to re-hear the cause. *Wilcox* v *Wilcox*, 36

2. It is proper for a court to refuse to re-hear a decree rendered by consent, because it is, in truth, the decree of the parties; but if a decree be the finding and judgment of the court upon the bill, answer, proofs and exhibits

in the cause, an interlocutory order subsequently rendered by consent, upon the footing of that decree, will not prevent the impeaching of the decree for error. *Ibid*

PLEADING.

1. The plaintiff filed his bill alleging that in a deed he had given to the defendant for a tract of land, he had through mistake, surprize, and ignorance, and without consideration, inserted a release for all the purchase money, when he had only received a part, and that the defendant had pleaded this release at law, and the plaintiff prayed for a discovery and for relief on the grounds stated. To this bill the defendant pleaded in bar the release itself. *Held* that this plea was not good, because neither the plea nor an answer accompanying it, denied the grounds, on which the plaintiff sought to be relieved from the release. *Crawley* v *Timberlake*, 346

2. The plaintiff alleges in his bill a contract which he cannot prove; but the defendant in his answer sets forth a contract in relation to the same transaction, upon which the plaintiff might have had relief, if he had alleged it in his bill. *Held*, that the plaintiff cannot recover upon these admissions of the defendant, as they show a contract different from that for which he sought the aid of the Court of Equity; especially where the defendant does not submit to any decree. *Herron* v *Cunningham*, 376

PRACTICE.

1. If an exception be admitted by the opposite counsel to be well founded, the court will sustain it, without enquiring into the matter of it. *Williams* v *Maitland*, 94
2. It is a sufficient reason for overruling an exception, that it is immaterial, and, whether sustained or disallowed, leads to no practical result. *Ibid*
3. A party cannot be permitted to insist on an exception, the subject matter of which was distinctly admitted before the master. *Ibid*
4. Where a case is set for hearing upon the bill, answers and exhibits, the court will consider the exhibits as proof offered by consent, notwithstanding there is no replication to the answers, which deny the fact intended to be established by the exhibits. *Armistead* v *Bozman*, 117
5. It is a rule of the court, that, when a replication to an answer has been omitted by mistake, but when witnesses have been examined, the court will permit a replication to be filed *nunc pro tunc*. *Ibid*
6. A report will not be re-committed, in order to have an immaterial matter explained, although originally ordered by the reference. *Shutt* v *Carloss*, 232
7. An answer cannot be put in for a defendant by one who calls himself his agent and attorney in fact, but who is not made a party by the bill. *Palmer* v *Yarborough*, 310

See PETITION TO RE-HEAR—INJUNCTION—EVIDENCE—COSTS MULTIFARIOUSNESS—PLEADING—PARTIES, 5.

PURCHASER.

1. Where A. delivered to B., but without endorsing it, a bond for six hundred dollars, upon the contract of B. to support her during her life, and educate her son, and A. remained but three months in B.'s family, when, from disagreement with B.'s wife, A. left the family, apparently with B.'s consent, and B. never afterwards contributed to the support of A., nor to the education of her son; *held* that B. could not, in conscience, claim to be a *bona fide* purchaser of the bond, for a valuable consideration; and he was therefore decreed to surrender the bond, or account for its value to the guardian of A., who had been subsequently declared a lunatic. *Shaw* v *Burney*, 148

2. When a party seeks to exempt himself from an equitable lien on land which he has purchased, on the ground that he was a purchaser without notice, he must shew that he not only received a deed for the land, but that he also paid the purchase money, before he had notice of the lien or trust. *Howlett* v *Thompson*, 369

See CONVERSION, 2—VENDOR & VENDEE, 1, 3.

RELEASE.

See EVIDENCE, 14, 15—PLEADING, 1.

REMAINDER.

Where A. is tenant for life of slaves, and B. and C. entitled in remainder, after the death of the tenant for life, the latter cannot compel the former to give *security* for the forthcoming of the slaves at the expiration of the life estate, unless they shew to the court that there is some danger of their being deprived of their estate in remainder by some act, or contemplated act, of the tenant for life. *Sutton* v *Craddock*, 134

See LEGACIES.

RE-SALE.

See CONTRACT, 1.

SEQUESTRATION.

See REMAINDER.

SPECIFIC PERFORMANCE.

1. If a bill be filed for the specific execution of an agreement for the purchase of land, alleged to be evidenced by a written memorandum, and the allegation be not sustained by the proof, the plaintiff cannot, under the prayer for general relief, obtain compensation for improvements upon the lands. *Smith* v *Smith*, 83

2. The specific execution of a contract in Equity is a matter, not of absolute right in the party, but of sound discretion in the court. An agreement, to be carried into execution there, must be certain, fair and just in all its parts. *Leigh* v *Crump*, 299

3. Although an agreement may be valid at law, and if it had been executed by the parties, could not be set aside because of any vice in its nature; yet if its strict performance be, under the circumstances, harsh and inequitable, a court of equity will not decree such performance, but leave the party claiming it to his legal remedy. *Ibid*

4. When the plaintiff agreed in writing to sell to the defendant a tract of land by the following description, viz. "a tract of land lying in the county of Northampton, containing one thousand acres more or less, bounded by the lands of Shirly Tisdale Mrs. Sally Pope, Herod Dukes and others," for the sum of 2000 dollars, and the defendant in his answer alleged that the tract contained only six hundred acres and agreed to take the land upon a proportionate abatement of the price, and where it was apparent that both parties, at the time of the contract, supposed it contained 1000 acres, the court *held* that if there was such a disproportion in the quantity (the other description not being by metes and bounds, nor either party practicing any imposition on the other,) the plaintiff could not have a decree for specific performance, without a proper abatement in the price, and the matter was referred to the clerk and master to report on these facts. *Ibid*

See VENDOR AND VENDEE 1.

SUBSTITUTION.

1. Where A., owing a debt, makes a conveyance of personal property, without consideration, the sureties to that debt, who have been compelled to pay it, and have afterwards established their claim at law against such debtor, are entitled to be substituted to the rights of the creditor in this court, and to have a decree for the sale of such property to satisfy their demand—all the property of the debtor being exhausted. *Tatum* v *Tatum*, 113

2. Where the sureties had brought an action upon such claim against the administrators, the donee of the property being one of the administrators, and the plea that they had fully administered was found in their favor, this is no bar to the bill of the sureties to subject this property, when the administrators do not rely upon the verdict and judgment at law as a defence, but admit in their answers that the property in question was not considered by the jury in their computation of assets. Whether the verdict and judgment at law would have been a bar, but for these admissions, *Quere?* *Ibid*

3. Nor is it any objection to the plaintiff's recovery in this case, that they proceeded against the lands, which proved insufficient to satisfy their demand. *Ibid*

SURETY.

Where a defendant appeals from the County to the Superior

Court, and then dies, whereupon the suit is revived against his executor or administrator, and the debt or demand established against the latter, but the plea of fully administered is found in his favor, the sureties for the appeal are bound for the amount of the debt or demand so ascertained, and judgment must be rendered against them accordingly; although the plaintiff only takes judgment *quando* against the executor or administrator, or sign judgment and pray process against the heirs or devisees. *Piercey* v *Piercey*, 214

See SUBSTITUTION—JURISDICTION, 10, 11, 18.—EVIDENCE, 19.—PARTIES, 2, 3, 4.

TENANT.

See JURISDICTION; 5.

TENANT BY THE CURTESY.

See HUSBAND AND WIFE, 2.

TENANT FOR LIFE.

The increase of the stocks of horses, cattle, and so forth, belong to the tenant for life; and so do also the crops left by the tenant as the fruits of his industry, and likewise at his death, the growing crops as emblements. *Poindexter* v *Blackburn*, 286

TIME.

1. Lapse of time constitutes no *bar* to the claim of the next of kin against an administrator, but only raises a presumption that satisfaction has been made, or the claim to it abandoned. *Bird* v *Graham*, 196

2. The farthest the court has gone in raising this presumption, is where there has been an interval of *twenty years after the time appointed for settlement with the next of kin*, and there has been no claim made, no explanation given of the delay to claim, and no circumstance appearing to show the trust yet unclosed. *Ibid*

3. It is too late for the next of kin to file a bill for an account against the administrator of an intestate, after the lapse of fifty-six years from the death of the intestate—of forty-six years from the coming of age of the party entitled to the account—and of thirty-five years after the death of the surviving administratrix, by whom the account ought to have been rendered. *Graham* v *Torrance*, 210

4. These facts are in themselves sufficient to bar the relief sought, independent of the other circumstances relied on. *Ibid*

See LIMITATIONS, Stat. of.

TRUST AND TRUSTEE.

1. When a man conveys certain property in trust to pay a particular debt, and the surplus after such payment to be returned to him, and at the same time expresses his intention by parol, that three other creditors shall be paid out of this surplus, and he will give orders to that effect, as he has had a settlement with such creditors, this is no defence to a bill filed against this trustee for an account by a second trustee to whom the same property was conveyed a day after-

wards in trust for the payment of other creditors. *Palmer* v *Yarborough*, 310

2. If a trustee, under a misapprehension of right, founded upon his own judgment, or even it would seem upon the judgment of counsel (except perhaps in some very peculiar cases,) part with the possession of property to persons not entitled; it is his misfortune, but public policy requires that he should be the sufferer; because he is regarded as having acted incautiously, although innocently. *Wade* v *Dick*, 313

3. But a trustee is clearly protected by a judgment against him of a competent tribunal, in regard to the subject matter of such judgment. And *it seems* that this protection should be extended to him, in regard to other property, similarly situated, which he disposes of in acquiescence of such judicial determination—it being well understood that he is not cognizant of error or surprise therein, or any unfairness in procuring it. *Ibid*

4. The law never compels a trustee, who sells under his trust, to enter into any covenants in his deed, except a covenant against his own incumbrances. *Ehnis* v *Leach*, 416

5. But it is his duty to procure a good title to be made before he can exact the purchase money, when at the sale he has declared that a good title should be made. *Ibid*

6. An express trust is not, as was formerly held, a *chose in action*, but, in equity, is considered a present interest, an estate in possession. Therefore, where such a trust is in a *feme*, in personal property, and she marries, the whole interest of the wife vests in her husband immediately and absolutely, and, on his death before his wife, belongs to his personal representatives. *Miller* v *Bingham*. 423

7. The possession of the trustee is, in equity, the possession of the *cestui que trust*. *Ibid*

8. The doctrine applies, even where the trustee is to hold the property, and pay over only the annual rents, profits, &c. *Ibid*

9. The court will not, however, of course divest the trustee of the management of the trust property, and deliver possession to the *cestui que trust*. This must depend upon the intention of him, by whom the trust was created. *Ibid*

10. Where property is conveyed to a trustee, in trust *for the sole and separate* use of a woman then married, and she survives her husband and marries a second time, the wife no longer holds the property to her *sole* and *separate* use, but her whole interest, if it be personal property, vests in her second husband. *Ibid*

See FRAUD, 2, 3, 4—CORPORATIONS, 3.

VENDOR AND VENDEE.

1. Where an agreement in writing was made for the purchase of a tract of land, by which the vendee was to take possession of the land immediately, and the

vendor was, " when thereto requested," to deliver him a deed therefor, upon the receipt of which the vendee was to give his three several promissory notes, payable at one, two and three years thereafter; and the vendee took possession of the land immediately, according to the agreement, but the vendor died without giving a deed, or receiving the notes for the purchase money, *it was held*, upon a bill subsequently filed by the vendee for a specific execution of the contract, that he should pay interest on the instalments of the purchase money, as if the notes had been given in a reasonable time after the date of the agreement. *McKay* v *Melvin*, 73

2. It is yet doubtful in this State, whether a vendor of land has any, and, if any, what lien, as against the vendee, for the purchase money. *Crawley* v *Timberlake*, 346

3. Where a negociation for the purchase of a tract of land was pending for several months, and the plaintiff had sufficient opportunities of informing himself as to its localities and boundaries, he cannot bring a bill to be relieved against the purchase, especially when he has no proof of misrepresentation by the defendant. *Whicker* v *Crews*, 351

See SPECIFIC PERFORMANCE—JURISDICTION, 9.—FRAUD—PURCHASER—EXECUTORS AND ADMINISTRATORS, 9.